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IN THE

Supreme Court of the United States

No. 342
October Term [redacted] 1970

HUGH WENDELL MAC DONALD,
Appellant and Respondent,

vs.

JAMES A. MUSICK,
Appellee and Petitioner.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Justice Warren E. Burger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by the State of California for a Writ of Certiorari to review judgment of the United States Court of Appeals for the Ninth Circuit granting the Writ of *Habeas Corpus* in the above case.

Opinions Below.

The District Court's order of November 27, 1967, denied the writ without opinion. The United States District Court of Appeals for the Ninth Circuit granted the writ, Judge Kilkenny dissenting. The opinion is unreported. The judgment is stayed pursuant to Rule 41 of the Federal Rules (see Attachments A and C).

Jurisdictional Statement.

The date of the Judgment sought to be reviewed is April 20, 1970, and the time of its entry is April 20, 1970 (see Attachment B). An order denying a rehearing was entered on June 2, 1970 (Attachment B). The statutory provision believed to give this court jurisdiction to review the judgment is 28 U.S. § 1524.

Questions Presented.

1. Whether an unsuccessful attempt to dismiss a misdemeanor complaint upon a stipulation of probable cause for the arrest by either the court or the prosecution where the state statute gives the trial court the exclusive power to accept or deny dismissal constitutes a violation of a defendant's right to due process under the Federal Constitution or any other constitutional right.
2. Whether conditioning a voluntary dismissal of a misdemeanor complaint upon a stipulation of probable cause for the arrest by the court constitutes a misuse of the criminal process as a matter of law.
3. Whether the jurisdiction of the District Court was properly invoked in the request of a Writ of Habeas Corpus after the United States Supreme Court's dismissal of Defendant's appeal for want of jurisdiction and after denial of certiorari by the Supreme Court.

Statutes Involved.

The Constitution of the United States in general, the due process right under the Constitution, the First Amendment, and the Fourteenth Amendment in par-

ticular, as well as the constitutionality of California Penal Code Section 1385, which states:

> "The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

Statement of Case.

On January 9, 1965, Respondent was arrested in Orange County and was charged with Violation of California Vehicle Code Section 23102, which prohibits driving any vehicle on a public highway while under the influence of alcohol. An additional count charging Violation of California Penal Code Section 148 was added prior to the trial of the case.

Respondent was arraigned on January 14, 1965, on the charge of driving while under the influence of intoxicating liquor. On January 26, 1965, Deputy District Attorney Thomas A. Reilley moved to dismiss if Respondent would stipulate to the existence of probable cause for the arrest. Respondent having refused to so stipulate, the motion was either withdrawn by Mr. Reilley or denied by the court. On February 2, 1965, the deputy district attorney requested the court's permission to amend the complaint by adding a charge of resisting arrest. The hearing on this motion was had on February 3, 1965, and the motion was granted.

During the argument of the February 3, 1965, motion, Mr. Dave Bach, Jr., assistant district attorney, in an attempt to forestall the Respondent's request that

the whole staff of the District Attorney's office be ordered to testify, stipulated that "six deputy district attorneys indicated either displeasure with the case, or that it was a weak case, or that they would not care to prosecute it." He further stipulated that if Mr. Wells, one of the deputies, were called to testify he would admit having stated to Respondent's attorney that "It appears that the police department has a hard on against this defendant and are out to get him," or words to that effect.

A trial by jury was had on February 11, 1965, and the jury found the Respondent Not Guilty of the drunken driving charge but guilty of a violation of Section 148 of the California Penal Code.

On February 15, 1966, the Appellate Department of the Superior Court of Orange County affirmed the conviction. Certification of the case to the District Court of Appeal was denied by the Appellate Department of the Superior Court, and the judgment became final on March 9, 1966. Respondent appealed to the United States Supreme Court, and Petitioner herein filed a motion to dismiss. The Supreme Court of the United States granted Petitioner's Motion and dismissed the appeal for "want of jurisdiction." Treating the documents as a request for certiorari, it denied certiorari.

On September 29, 1967, the Respondent petitioned the United States District Court, Central District of California, for a Writ of Habeas Corpus. The Court, having considered the petition on the merits, denied

the petition by Order No. 67-1432-JWC, entered and filed November 27, 1967.

The Respondent having filed a timely appeal, the United States Court of Appeals for the Ninth District on April 20, 1970, reversed all prior decisions and granted the Writ of Habeas Corpus on the ground that the stipulation of probable cause violated the Respondent's right of due process under the Federal Constitution in that it hampered Respondent in asserting by civil action both State and Federal civil rights. It further held that the prosecutor's conduct, and the conduct of the court in aiding the prosecution, was improper and within the definition of extortion under the California Penal Code and was prohibited by the Canons of Professional Ethics.

Summary of Reasons Relied on for Allowance of Writ.

1. The decision of the Court of Appeals for the Ninth Circuit in this case, by presuming wrongful intent as a matter of law on the part of the State judiciary, so far departs from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision, and involves a Federal question which has not been, but should be, determined by this Court.

2. The decision of the Court of Appeals for the Ninth Circuit in this case, by determining that it had jurisdiction in that the Respondent was denied due process under the Federal Consti-

tution because of the State Court's refusal to dismiss the action, involves a Federal question which has not been, but should be, settled by this Court and so far departs from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The decision of the Court of Appeals for the Ninth Circuit in this case, by holding that the implied conditioning of a dismisal of a misdemeanor upon a stipulation of probable cause for the arrest by the State Court is prohibited because of wrongfulness of motive, has an inhibiting effect on negotiated pleas and is thus a decision of a Federal question in a way probably in conflict with applicable decisions of this Court.

4. The decision of the Court of Appeals for the Ninth Circuit, by assuming jurisdiction in this case, has redetermined an issue which had impliedly already been finally adjudicated by this Honorable Court in Case No. 503 Misc. October term, 1966.

ARGUMENTS.

I.

Where as Here by State Statute the Power to Grant or Deny a Motion to Dismiss Is Exclusively Vested in the Trial Court, the Decision of the District Court of Appeal Presumes Wrongful Intent of the Judiciary as a Matter of Law.

The decision states:

> "On January 26th the prosecutor moved to dismiss the charge. The Court asked if MacDonald would stipulate that there was probable cause for the arrest. MacDonald declined and the prosecutor withdrew the motion."

Petitioner respectfully submits that the record only shows, and the opinion concedes, that either the motion was withdrawn or denied. In either instance, under California law, the will of the prosecutor is not the prevailing will in such matters. The District Attorney's motion to dismiss was merely a recommendation which the court had *exclusive* discretion to accept or reject, says *People v. Johnson*, 247 Cal. App. 2d 331. Dismissal is within the court's exclusive discretion, reiterates *People v. Parks*, 230 Cal. App. 2d 805. *Nolle prosequi* has been abolished in California and *plenary* authority to dismiss criminal actions has been transferred to the court, states *People v. Superior Court*, 202 Cal. App. 2d 850. The court may dismiss *sua sponte* in "furtherance of justice": that is, balancing the interests between justice to society and to the defendant, held *People v. Superior Court*, 249 Cal. App. 2d 714. And when a court *sua sponte* orders dismissal, that order is non-appealable, states *People v. Superior Court*, 202 Cal. App. 2d 850.

In light of all the above authorities, the decision can thus only stand for the proposition that the California Judge in this case was a tool of the prosecution rather than the impartial guardian of all the rights of the people. This inference is not supported by the single question asked by the judge who not only is the one who has the power to accept the motion, but also has the power to make the motion *sua sponte*.

California law prohibits the *presumption* of wrongfulness on the part of the judiciary (Cal. Evid. Code 664), and there are no decisions in existence where such presumption has been rejected.

The only case to consider the power of *nolle prosequi* as a denial of due process is *Klopfer v. North Carolina*, 386 U.S. 213, 18 L. Ed. 2d 1. That case supports Petitioner's position. In that case:

> "Several weeks prior to the April 1965 Criminal Session of the Superior Court, the State's solicitor informed petitioner of his intention to have a nolle prosequi with leave entered in the case. During the session, petitioner, through his attorney, opposed the entry of such an order in open court. The trespass charge, he contended, was abated by the Civil Rights Act of 1964 as construed in *Hamm v. City of Rock Hill*, 379 U.S. 306, 13 L. ed. 2d 300, 85 S. Ct. 384 (1964). In spite of petitioner's opposition, the court indicated that it would approve entry of a nolle prosequi with leave if requested to do so by the solicitor. But the solicitor* declined to make a motion for a nolle prosequi with leave."
>
> *(386 U.S. 218)

Subsequently, petitioner therein filed several motions to have the case either dismissed or brought to trial:

> "In response to the motion, the trial judge considered the status of petitioner's case in open court on Monday, August 9, 1965, at which time the solicitor moved the court that the State be permitted to take a nolle prosequi with leave. Even though no justification for the proposed entry was offered by the State, and, in spite of petitioner's objection to the order, the court granted the State's motion."

The Supreme Court made no comment on the court's action and based its decision solely on the fact that the North Carolina *nolle prosequi* law was unconstitutional because it denied the defendant the right to a speedy trial. The difference between the California statute and the North Carolina statute is clear. While the North Carolina statute placed on the court the power to accept or reject, the California statute allows the court to dismiss *sua sponte* and places the sole responsibility for the dismissal upon the court. Right to speedy trial, of course, is separately provided for by the California Code, which requires dismissal of actions not prosecuted within a very limited period of time.

None of the other cases cited either by the decision by Respondent, or by *Amici Curiae* are here applicable since they all, without exception, deal with the abuse of a *nolle prosequi* by the prosecution. It is submitted that no decision exists in which the acts of the prosecution have been imputed to the court, or the court's motive presumed wrongful as a matter of law.

The same arguments apply to the California Court's allowance of the filing of an amended complaint in this case since California Penal Code Section 1009 makes the right to allow for an amendment discretionary with the court.

What the decision in the case at hand has done is to say that any independent determination of the State court which is favorable to the prosecution, and for which the court does not set forth its independent reasoning, is automatically presumed wrongful in its intent if the District Attorney has argued on the wrong grounds.

Nor is there merit in the argument that the sole purpose in the court's request for the stipulation is the protection of the public entity from suits stemming from the actions of a police officer.

What, in fact, is the meaning of an admission that the arrest was made upon probable cause except an admission of guilt? And what is the acceptance by the court of a stipulation of this type except a statement that while the offense probably took place, it is not such an offense as to require further punishment through the judicial process so long as the defendant admits he has done wrong?

Assuming the court to believe that so long as this defendant understands that it is wrong to commit certain acts—for example, driving while intoxicated—the chance of his not repeating the act is such that no great danger will result to the rest of the driving public in the future, would the court not be justified in allowing the defendant to go free upon condition that he at least admit he might have done wrong? By the same token, assuming the defendant to categorically state his

innocence by refusing to stipulate that there was even a reason to arrest him, would the court not be justified in thinking that since an issue of fact is clearly presented by the denial of the defendant on the one side and the assertions, under oath, of the complainant on the other side, the resolution of the issue should be resolved by the trier of fact?

Brady v. United States, S. Ct. Bulletin B 1505, 1513, approves of the preservation of "scarce judicial and prosecutorial resources" for "those cases in which there is a substantial issue of the defendant's guilt or in which there is a substantial doubt that the State can sustain its burden of proof."

II.

The Respondent in This Case Was Not Denied Due Process Under the Federal Constitution.

The decision specifically holds that the offer of stipulation and the refusal by the court deprived the Respondent of due process under the Federal Constitution in that it "attempted" to coerce the Respondent to give up his right to redress under the Civil Rights Act. The decision further points out that the prosecutor's and judge's conduct represented "a misuse of the criminal process by an attorney to gain advantage for his client in a civil case."

The first question to be answered is whether there was a violation of due process; that is, whether the Respondent was deprived of any right. It is submitted that since the Respondent did not agree to the stipulation, he *was not* in any way hampered from filing suit. That he chose not to do so, if that is the case, is not due to the so-called "attempt." There is thus a basic

lack of a cause and effect relationship between the so-called "attempt" and the result. It is respectfully submitted that in *all* of the cases cited by the decision on this issue, the interference of the Federal Court was warranted because there was in fact a *present* deprivation of civil rights which the court could correct. Not one of the cases dealt with past "attempts."

Additionally, in no way could the defendant in such cases be "coerced." He is represented by counsel and has the choice of accepting or of rejecting the compromise. If he accepts, he can still seek redress through the civil courts since a stipulation of probable cause, *if found to be coerced, would not be admissible evidence in either Federal or state courts.* The *only* possible bar in fact is the finding of guilty by the jury.

That finding of guilty, however, only shows that the additional charge was proper and that neither the prosecutor nor the court used their charging power to compel the stipulation. Here, as in *Brady v. United States*, S. Ct. Bulletin B1504, Note 8:

> ". . . there is no claim that the prosecutor threatened prosecution on a charge not justified by the evidence or that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty."

It is further submitted that a defendant represented by counsel who refuses to accept a dismissal conditioned upon a stipulation of probable cause has in no way been deprived of *any* constitutional rights. Such a stipulation is no different than an offer of a plea to a lesser included offense, which offer is rejected.

Has a defendant to whom a lesser plea is offered, and who refuses to plead, been deprived of a constitutional right? How? Has he been coerced? Obviously not! Can he, after trial and conviction, petition that he has been wrongfully convicted because the judge or the prosecution "attempted" to make him confess? Has he been deprived of any evidence? Was his trial "unfair" because of the behavior of the judge or of the prosecution? To so hold would be to stretch the constitutional skin to the breaking point and to render countless numbers of convictions subject to collateral attack on grounds that are immaterial as well as frivolous. The Federal courts have no jurisdiction to control so-called unsuccessful "attempts" to interfere with constitutional rights *since after the attempt* is unsuccessful the issue is moot, and no loss of rights has resulted because of it.

III.

The Decision Has an Inhibiting Effect on All Negotiated Pleas.

Assume the following hypothetical: The defendant is charged by the indictment of possession of marijuana. The case presents unusual search and seizure problems or other problems that would require more work than the prosecutor can give to the one particular case. The prosecutor offers to lower the charge to a misdemeanor if the defendant will plead to it.

After the bargain is explained to the court, the information is amended to charge a misdemeanor rather than a felony count and the defendant pleads to it. Subsequently, the defendant withdraws his plea. Is the prosecution prohibited from refiling the felony count? Is the prosecution prohibited from proceeding on *any*

count? The decision of this Court answers in the affirmative. Why? A guilty plea, says *Boykin v. Alabama*, 395 U.S. 238, is a waiver of many constitutional rights. A guilty plea to a misdemeanor or any other charge is *also* an admission that probable cause existed for the arrest. *Accordingly, the recommendation by the prosecutor to the court would fall within the decision's prohibition against conditioning dismissal of the charge upon a stipulation designed to forestall the defendant's civil rights.*

And not only would all bargained pleas fall within the above prohibition, they would also fall within the court's definition of what constitutes "presenting or threatening to present criminal charges solely to obtain an advantage in a civil matter" since it is submitted that in every "plea bargain" the prosecutor's offer perforce involves the balancing by the prosecutor of the cost of the trial because of length of the trial, necessity of bringing in out-of-state witnesses, lack of time in which to try all cases, crowdedness of the court's calendar (which would eventually, under California law, force dismissal because of denial of a speedy trial, etc.) with the strength of the case involved and the willingness of the defense to admit his guilt to a lesser charge. All of the above considerations are thus of a material nature since the same entity, rather the same citizens whose taxes pay for the defense of civil suits by public officials also pay for the prosecution and trial of criminal proceedings.

Moreover, the rationale used by the decision to determine the validity of the bargained-for admission of guilt is totally opposite to the rationale used by this Honorable Court in *Brady* where the court determines

the validity of the plea on the basis of its voluntary character and not on the basis of the purity of the judge's or the prosecutor's motives in offering the bargain.

IV.

Denial of Appeal and of Certiorari by the United States Supreme Court Is a Final Determination of the Issue in This Case.

In determining and delineating the jurisdiction of the Supreme Court of the United States, Section 28 U.S.C. 1257, states:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> 1. By appeal where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, Treaties or Cases of the United States and the decision is in favor of its validity.
>
> . . . .
>
> 2. By Writ of Certiorari where the validity of a state statute drawn in question on the ground of its being repugnant to the Constitution, Treaties or Laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution."

A careful scrutiny of the pleadings involved in the appeal filed with the United States Supreme Court in this case and a comparison with the jurisdictional requirements set out above gives clear meaning to the opinion rendered by the Supreme Court.

The record shows the following facts:

The constitutionality of a state statute, as well as lack of due process, were strongly alleged by Respondent in his petition to the Supreme Court.

The Supreme Court, while having the case under consideration, and prior to issuing its opinion, requested knowledge of whether the case had been reviewed by the Supreme Court of the State of California.

The District Attorney filed an "Additional Response Regarding Jurisdiction" sustaining Appellant's (Respondent herein) contention that the remedies in the State court, including *Habeas Corpus* proceedings, had been exhausted because not available.

Appellee, Petitioner herein, filed with the Supreme Court a motion to dismiss, alleging that the State statute claimed to be unconstitutional was not directly drawn in question in the lower courts and was not crucial to the disposition of this case; that the record on its face showed the arresting officer to have probable cause for the arrest and therefore that there was a presumption in favor of the legality of the arrest; and that the conviction of Respondent could well have been, and was in fact, determined on factors other than the alleged "manifest bad faith of the prosecution."

The Supreme Court, bottoming its ruling on a review of the "statement of jurisdiction, the motion to dismiss and the transcript of record," states:

> "On consideration whereof, it is ordered by this court that the motion to dismiss the appeal herein be, and it is hereby, granted. It is further ordered that the appeal herein be, and it is hereby, dismissed for want of jurisdiction."

The Supreme Court's order, after considering the appeal as a petition for certiorari, denies the petition.

In light of the provisions of 28 U.S.C. 1257(1), *supra*, and of the proceedings above stated, what can be the meaning of the dismissal of the appeal and of the court's denial of certiorari? Since that statute provides for jurisdiction in all cases where a constitutional right has been violated, it cannot reasonably be argued that had the court found a lack of due process in Respondent's case, the court's jurisdiction would have been lacking.

Had the Supreme Court determined the constitutionality of the statute not to have been in question, but had it also found that Respondent's constitutional rights of due process had been violated, it would have granted the motion to dismiss the appeal, but it could also have granted certiorari, determined the merits or remanded the case to the State court. Thus, in *Henry v. Louisiana*, 88 S. Ct. Rptr. 2274, for example, the court orders:

> "The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is granted and the judgment is reversed."

In the case at hand, the court's ruling on the matter of certiorari merely states:

> "Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied."

It is true that, as Respondent has contended, the Supreme Court could have considered this a case of "dis-

cretionary jurisdiction," [RT on appeal p. 5], and thus denied the writ without qualification, but if that is the case should not the Federal Court exercise its discretion in the same manner—especially since the Writ of Habeas Corpus was denied on the merit by the Federal District Court?

V.

Conclusion.

Wherefore, the State of California, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

Dated this 30th day of June, 1970.

Respectfully submitted,

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MICHAEL R. CAPIZZI, *Deputy District Attorney,*

By ORETTA D. SEARS, *Deputy District Attorney,*

Counsel for Petitioner.

Oretta D. Sears admitted to practice in the United States Supreme Court under the name of Oretta D. Small.

ATTACHMENT A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Hugh Wendell MacDonald, Appellant, vs. James A. Musick, Appellee. No. 22,781.

[April 20, 1970]

Appeal from the United States District Court for the Central District of California.

Before: DUNIWAY, HUFSTEDLER and KILKENNY, Circuit Judges.

DUNIWAY, Circuit Judge:

Habeas corpus. The District Court denied the writ. We reverse. MacDonald has exhausted his state remedies.

On January 9, 1965, MacDonald was driving his car in Newport Beach, California. He was stopped by the local police and ultimately arrested and taken to the police station. There he was booked as violating section 23102(a) of the Vehicle Code of California, which makes it a misdemeanor for "any person who is under the influence of intoxicating liquor . . . to drive a vehicle upon any highway." On January 11, 1965, a complaint was filed in the Municipal Court of the Newport Beach Judicial District charging him with that offense. On January 14, 1965, MacDonald pled not guilty and demanded a jury trial, which was set for January 26.

On January 26, the prosecutor moved to dismiss the charge. The court asked if MacDonald would stipulate that there was probable cause for his arrest. MacDon-

ald declined, and the prosecutor withdrew the motion. In California, only the court may dismiss a criminal action. (Cal.Pen.C. § 1385.) Had the action been dismissed, the dismissal would have been a bar to further prosecution for the offense charged. (*Id.* §1387.) Trial was set for February 2.

On February 2, the prosecutor moved under Cal. Pen.C. § 1009 for leave to file an amended complaint, adding a second count charging MacDonald with resisting arrest, Cal.Pen.C. § 148, also a misdemeanor. The motion was opposed, and was fully argued on February 3. The court granted the motion. MacDonald was then rearraigned and pled not guilty to both charges. Trial before a jury was had, beginning February 9, and on February 11, the jury acquitted MacDonald on the drunk driving charge and found him guilty of resisting arrest.

There was considerable conflict in the evidence as to the events leading to MacDonald's arrest, and particularly as to whether there was probable cause for the arrest, as well as about what happened thereafter. We need not analyze the evidence, however, because of the ground upon which we decide the case. Nor need we consider MacDonald's claim that he was convicted under a statute that makes it illegal to resist an unlawful arrest (Pen.C. § 834a), and that such a conviction violates his federal constitutional rights.

The reason for the prosecutor's withdrawing his motion to dismiss the drunk driving charge and for then seeking to file an amendment to add the resisting arrest charge, is made clear by the record in the state case. At the hearing on the motion for leave to file an amended complaint, on February 3, there were a number of

stipulations. MacDonald proposed to call as witnesses six deputies in the District Attorney's office. The prosecutor stipulated:

> "It is so stipulated that all these Deputies indicated either displeasure with the case or that it was a weak case or that they would not care to prosecute it."

It was further stipulated that one deputy said:

> " 'It appears that the police department has a hard on against this defendant and are out to get him.' or words to that effect, close quote."

It was also stipulated that a police lieutenant said:

> "that he would stipulate that they did in fact delete the second charge of resisting arrest from their record, did in fact reduce the bail, and would stipulate that a police official, I think it was a policewoman, did state to the defendant's witness, 'You will be happy to know that the resisting arrest charge has been dropped.' "

In suport of the motion for leave to amend, the prosecutor said:

> "Normally a defendant will stipulate to probable cause, and there is only one reason, let's face it, for that stipulation, so that the defendant cannot sue the police department. This particular defendant would not stipulate to probable cause, which made it obvious, at least, there was an inference drawn, that perhaps here is a defendant that does have in mind suing the police department.
>
> . . . .
>
> "It seems to me that it is the duty of the Deputy District Attorney, in addition to prosecuting crim-

inals, to protect the police officers, and in so protecting the police officers, it seems to me, after evaluating the facts, any Deputy District Attorney worth his salt would have at that point included any offense, obviously! in the report on which the defendant could have been convicted."

We strongly disagree. It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against policemen, even where the civil case arises from the events that are also the basis for the criminal charge. We do not mean that the prosecutor cannot present such a criminal charge. What he cannot do is condition a voluntary dismissal of a charge upon a stipulation by the defendant that is designed to forestall the latter's civil case. The situation is made no better by the fact that here the record indicates that it was the court that asked MacDonald whether he would stipulate. Rather, it makes it worse. It brings the court to the aid of the prosecutor in coercing the defendant into agreeing to what amounts to a forfeiture of his civil rights. Nor can the prosecutor, because of failure to obtain the demanded stipulation, then introduce another charge in the hope of defeating the possible civil action of the defendant.

The impropriety of the prosecutor's conduct requires little exposition. In California, extortion is defined as "the obtaining of property from another, . . . induced by a wrongful use of . . . fear, or under color of official right." (Cal.Pen.C. § 518.) There is no doubt that a cause of action for personal injuries is property. *Franklin v. Franklin*, 1945, 67 Cal.App.2d 717, 155 P.2d 637. Section 519 of the same code defines "fear" as

"induced by a threat . . . 2. To accuse the individual threatened . . . of any crime. . . ." See *Barton v. State Bar of California*, 1935, 2 Cal.2d 294, 40 P.2d 502; *Bridge v. Ruggles*, 1927, 202 Cal. 326, 260 Pac. 553; *People v. Sanders*, 1922, 188 Cal. 744, 207 Pac. 744; *People v. Beggs*, 1918, 178 Cal. 79, 172 Pac. 152; *People v. Sexton*, 1901, 132 Cal. 37, 64 Pac. 107; *Morrill v. Nightingale*, 1892, 93 Cal. 452, 28 Pac. 1068; *People v. Franquelin*, 1952, 109 Cal.App.2d 777, 241 P.2d 651; *People v. Goldstein*, 1948, 84 Cal. App.2d 581, 191 P.2d 102; *People v. Phillips*, 1935, 10 Cal.App.2d 457, 51 P.2d 1120; *People v. Powell*, 1934, 1 Cal.App.2d 222, 36 Pac.2d 201.

The Canons of Ethics have long prohibited misuse of the criminal process by an attorney to gain advantage for his client in a civil case. ABA Code of Professional Responsibility, 1969, provides in section DR 7-105, p. 88: "(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." See *Barton v. State Bar of California, supra*. In this respect, we can see no difference between public prosecutors and other lawyers. See ABA Code, *supra*, §§ EC 7-13, 7-14, pp. 79-80, DR 7-103(A), p. 87. See also Opinion No. 131, Virginia State Bar Council, Oct. 25, 1963, Virginia Bar News, December 1963, p. 3; Report of the President's Commission on Crime in the District of Columbia, 1966, p. 338; *Dixon v. District of Columbia*, D.C. Cir., 1968, 394 F.2d 966. In such a case as this, if the policemen were sued, the public entity employing the policemen would be obliged, upon their request, to defend them or at least to pay any judgment against them or to indemnify them. Cal. Gov't Code §§ 825 *ff*.

We are aware, however, that not everything that may happen to a defendant in a state court is ground for issuance of a writ of habeas corpus by a federal court, no matter how much we may disapprove. It must appear that the petitioner ". . . is in custody in violation of the Constitution or laws or treaties of the United States. . . ." (28 U.S.C. § 224(c) (3)). We think that this is such a case.

In *N.A.A.C.P. v. Button*, 1963, 371 U.S. 415, the Supreme Court held that the right of a group having a common interest in the civil rights of its members to band together for the purpose of initiating litigation in the field of civil rights is protected by the First Amendment, made applicable to the states by the Fourteenth. The First Amendment protects "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Court regarded litigation as one form of petition for redress. This concept was somewhat expanded in *Brotherhood of Railroad Trainmen v. Virginia*, 1964, 377 U.S. 1. There, while group activity was involved, its purpose was to assist individual members and their families in prosecuting personal injury claims. The Court invoked the First Amendment "guarantees of free speech, petition and assembly" (p. 5). It also said:

> "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest."

This is a reference to the fact that the suits brought by union members were generally brought under the Federal Employers' Liability Act (45 U.S.C. §§ 51-60)

and the Safety Appliance Act (45 U.S.C. §§ 1-43). Thus one ground of the decision is that the state may not interfere with the assertion of a federal claim.

The same principles were applied in *United Mine Workers v. Illinois State Bar Assn.*, 1967, 389 U.S. 217, where the Court emphasized that the protections of the First Amendment are not limited to cases in which the contemplated litigation can be characterized as political, and indeed "are not confined to any field of human interest." (p. 223.)

Finally, in *Johnson v. Avery*, 1968, 393 U.S. 483, the Court re-emphasized, in a habeas corpus setting, the federal protection of the right to seek redress from the federal courts, striking down certain state prison rules deemed to hamper that right. In so doing, it cited similar cases dealing with state limitations upon access to state courts, such as *Smith v. Bennett*, 1961, 365 U.S. 708; *Long v. District Court*, 1966, 385 U.S. 192, and *Griffin v. Illinois*, 1956, 351 U.S. 12. These cases all involved indigent prisoners, and were decided on equal protection grounds under the Fourteenth Amendment. But they do demonstrate the constitutional importance of access to the courts. This court, in *DeWitt v. Pail*, 9 Cir., 1966, 366 F.2d 682, 685-86, held that depriving a state prisoner of access to the state courts violated his right to due process under the federal Constitution, thus giving rise to a cause of action under the Civil Rights Act.

In this case, MacDonald asserts that his arrest was unlawful, that he had a right to resist, and that as a result of his doing so he was badly beaten by the police. We express no views as to the merits of these claims. But MacDonald, in addition to whatever rights

he had under the law of California, had a claim to a federal right under the Civil Rights Act, 42 U.S.C. § 1983. *Morgan v. Labiak*, 10 Cir., 1966, 368 F.2d 338; *Stringer v. Dilger*, 10 Cir., 1963, 313 F.2d 536; *cf. Wiltsie v. Calif. Dept. of Corrections*, 9 Cir., 1969, 406 F.2d 515; *York v. Story*, 9 Cir., 1963, 324 F.2d 450; *Cohen v. Norris*, 9 Cir., 1962, 300 F.2d 24. See also *Monroe v. Pape*, 1961, 365 U.S. 167; *Screws v. United States*, 1945, 325 U.S. 91. Thus in this case, the attempt, by imposing the stipulation as a condition to the dismissal of the drunk driving charge, was to hamper MacDonald in asserting, by civil action, both state and federal civil rights. And the revival of the resisting arrest charge was the bludgeon behind the attempt.

The order appealed from is reversed and the matter is remanded with directions to grant the writ of habeas corpus.

KILKENNY, Circuit Judge, Dissenting:

I believe the approach of the majority is wholly unrealistic. On many occasions, in the criminal field, the prosecutor must make a decision on whether he will go forward with the prosecution on the original charge or add another count. On some occasions, he may feel that the overall evidence is somewhat weak, even though he believes there is probable cause for the arrest. If, under these circumstances, the charge is dismissed, some person, including the arresting officer, might well be faced with a civil action, even though there was probable cause for the arrest. Of course, this was true long before the passage of the Civil Rights Act. The latter merely gives to the plaintiff, in some instances, to a choice of forums.

The civil rights actions, under state law, include among others those for false arrest and false imprisonment. It is my firm belief that those in charge of prosecution of criminal actions have a duty to protect, if probable cause exists, arresting officers from both state or federal civil actions. We are not here concerned with a coerced plea of guilty. Appellant had his day in court and was found guilty of resisting arrest. The fact that he was acquitted on the original charge does not signify that there was no probable cause for the arrest. It merely means that the state failed to prove guilt beyond a reasonable doubt.

My thinking processes do not shudder at the protrait of the state judge asking appellant if he would agree to probable cause for the arrest. Many, many exceptionally able trial judges use this procedure to determine the appropriate action to take on the motion to dismiss. If appellant had so stipulated, the judge might well have denied the motion to dismiss. Beyond question, he would have inquired, in depth, of the prosecutor as to the appropriateness of a dismissal under these circumstances. The prosecutor, when appellant refused to agree to probable cause, was well within his rights in asking for a withdrawal of the motion to dismiss. In my view, there is nothing constitutionally objectionable in the district attorney's statement that it was his duty to include in the complaint any offense of which the appellant might be convicted. I am persuaded that the majority has erroneously raised a simple procedural act of the prosecutor to the dignity of constitutional dimensions.

Moreover, I would resolve the other issues against the appellant and affirm the judgment of the district court.

ATTACHMENT B.

Order Directing Filing of Opinion and Dissenting Opinion and Filing and Recording of Judgment.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, April 20th, 1970.

Before: DUNIWAY, HUFSTEDLER and KILKENNEY, Circuit Judges.

ORDERED that the typewritten opinions this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the majority opinion rendered.

ATTACHMENT C.

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco, California 94101

June 2, 1970

Cecil Hicks, Esq.
District Attorney
212 Hall of Records
Santa Ana, Calif. 92701

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 22781—Hugh Wendell MacDonald vs. James A. Musick was this day denied.

Pursuant to Rule 41(a) and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of seven (7) days from the date hereof.

Sincerely,

Wm. B. Luck,
Clerk.

Order.

United States Court of Appeals, For the Ninth Circuit.

Hugh Wendell MacDonald, Appellant, vs. James A. Musick, Appellee. No. 22,781.

Filed: June 2, 1970.

Before: DUNIWAY, HUFSTEDLER and KILKENNY, Circuit Judges.

The petition for a rehearing may be filed. The petition is denied.

Pursuant to Rule 35(b) of Federal Rules of Appellate Procedure, the appellant's suggestion of a rehearing in banc has been transmitted to all of the judges of the court who are in regular active service. No judge of the court has requested a vote on the suggestion. The suggestion of a rehearing in banc is rejected.

Office of the Clerk
United States Court of Appeals for the
Ninth Circuit

U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

June 15, 1970

John F. Davis, Esq.
Clerk, Supreme Court of the United States
Supreme Court Building
Washington, D.C. 20543

Re: 22781

James A. Musick vs. Hugh Wendell MacDonald

Dear Sir:

Enclosed find the certified typewritten transcript of record in two volumes, together with the typewritten proceedings had in this Court (contained in and part of volume one), on the above cause for use upon petition to the Supreme Court of the United States for a writ of certiorari.

Cecil Hicks, District Attorney, 212 Hall of Records, Santa Ana, California, 92701, is counsel for the petitioner.

Hillel Chodos, Attorney at Law, 9107 Wilshire Blvd., Beverly Hills, California, 90210, is counsel for the respondent.

Kindly acknowledge receipt of the above mentioned material on the carbon copy of this letter and return to me for our files.

Yours very truely,

WBL:rh
Encls.

William B. Luck,
Clerk

CC: Cecil Hicks, District Attorney, Hillel Chodos, Attorney at Law.

Transcript of Record in the Supreme Court of the United States.

October Term, 1969 No. .....

IN TWO VOLUMES

James A. Musick, Petitioner, vs. Hugh Wendell MacDonald, Respondent.

Volume One

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Proceedings had in Court of Appeals in this volume.

United States Court of Appeals for the Ninth Circuit.

Hugh Wendell MacDonald, Appellant, vs. James A. Musick, Appellee. No. 22781.

Appeal from the United States District Court, for the Central District of California.

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Order of Submission.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, October 7th, 1969.

Before: DUNIWAY, HUFSTEDLER and KILKENNY, Circuit Judges.

This cause coming on for hearing, Hillel Chodos, Attorney argued for the appellant, and Oretta D. Sears, Deputy District Attorney argued for the appellee, thereupon the Court ordered the cause submitted for consideration and decision.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Hugh Wendell MacDonald, Appellant, v. James A. Musick, Appellee. No. 22781.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court. Court.

Filed and entered April 20, 1970.

Order Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, June 2nd, 1970.

Before: DUNIWAY, HUFSTEDLER and KILKENNEY, Circuit Judges.

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellee filed June 2, 1970 and within time allowed therefor, and valid extension thereof, by rule of Court, for a rehearing of above cause be, and hereby is denied, and suggestion for a rehearing en banc is rejected.

———

Certificate of Clerk, United States Court of Appeals for the Ninth Circuit, to Record Certified Under Rule 21 of the Revised Rules of the Supreme Court of the United States.

United States Court of Appeals for the Ninth Circuit.

Hugh Wendell MacDonald, Appellant vs. James A. Musick, Appellee. No. 22781.

I, WILLIAM B. LUCK, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify this transcript of record in two volumes to be a full, true, and correct copy of the entire record of the above entitled cause in the said Court of Appeals, made pursuant to the request of counsel for the appellee and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States.

ATTEST my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 5th day of June, 1970.

William B. Luck, Clerk